

1 OLIVER W. WANGER, Bar No. 40331  
2 Wanger Jones Helsley PC  
3 265 E. River Park Circle, Suite 310  
P.O. Box 28340  
Fresno, CA 93729  
Telephone: (559) 233-4800  
Fax: (559) 233-9330  
owanger@wjhattorneys.com

5 MARC DAYS, Bar No. 184098  
6 Days Law Firm  
1107 R Street  
7 Fresno, CA 93721  
Telephone: (559) 708-4844  
8 Fax: (559) 486-1826  
marcdays@dayslawfirm.com

9 JOHN BALAZS, Bar No. 157287  
10 Attorney at Law  
916 2nd Street, Suite F  
11 Sacramento, CA 95814  
Telephone: (916) 447-9299  
12 Fax: (916) 557-1118  
balazslaw@gmail.com

13 Attorneys for Defendant  
14 DENNIS FALASCHI

15  
16  
17  
18 UNITED STATES DISTRICT COURT  
19 EASTERN DISTRICT OF CALIFORNIA  
20

21 UNITED STATES OF AMERICA,

No. 1:22-CR-00103-JLT

22 Plaintiff,

**Defendant Dennis Falaschi's Reply to  
Government's Opposition to Motion to  
Dismiss Counts 1-2**

23 v.

24 DENNIS FALASCHI,

Motion Hearing:  
Date: January 23, 2023  
Time: 10 a.m.  
Hon. Jennifer L. Thurston

25 Defendant.

26

27

28

1       **I. INTRODUCTION**

2           The indictment alleges water leaked from the Delta Mendota Canal (DMC) into a farmer's  
3 standpipe, then into the Panoche Water District (PWD) canal system, where it was combined with  
4 PWD's other water sources and sold to PWD's customers. [Dkt. 1 at 13]. Defendant Dennis  
5 Falaschi moves, pursuant to Federal Rule of Criminal Procedure 12(b), to dismiss counts 1 and 2  
6 on the grounds the water at issue, described as leaking from the DMC, was seepage PWD was  
7 authorized to put to reasonable and beneficial use pursuant to PWD's water contracts with the  
8 Bureau of Reclamation (Bureau) without any payment.

9           Seepage is the loss of water from a watercourse or body of water through its slow  
10 movement through the ground or a wall. *Ballentine's Law Dictionary*, (3<sup>rd</sup> Ed. 2010). The  
11 indictment alleges 0.25% (1/4 of 1%) of the water flowing through the DMC leaked, or seeped,  
12 from the DMC. [Dkt. 1 at ¶¶6, 9, and 16].<sup>1</sup> The government estimates 82 gallons per day as the  
13 average per capita water use, or 328 gallons per day for a family of four.<sup>2</sup> Relative to a loss of  
14 0.25% from the DMC, a loss of 0.25% of water delivered to a family of four equals a water loss at  
15 the rate of 4.352 ounces per hour, approximately ½ cup per hour. According to the federal  
16 Environmental Protection Agency (EPA), a showerhead leaking at 10 drips per minute, a drip  
17 every six seconds, losses more than 500 gallons per year, a loss of at least 0.41% of the average  
18 amount of water delivered to a family of four, a rate of water loss 61% greater than the alleged  
19 rate of water loss from the DMC, 0.25%.<sup>3</sup>

20

---

21           <sup>1</sup> The indictment alleges 2,000,000 acre feet (AF) of water pass through the DMC each year and  
22 over an approximate 23 year period of time, 130,000 AF leaked from the DMC into the standpipe,  
23 an average of 5,652 AF per year or 15.5 AF per day, a seepage rate of 0.25% (1/4 of 1%) of the  
24 water the government alleges passing through the DMC. None of this is accurate. The defense  
25 intends to prove the volume alleged by the government is ridiculous, but nonetheless, for  
26 purposes of this motion the defense will address the volume alleged by the government.

27           <sup>2</sup> Dieter, C.A., and Maupin, M.A., 2017, Public supply and domestic water use in the United  
28 States, 2015: U.S. Geological Survey Open-File Report  
2017-1131, 6 p., <https://doi.org/10.3133/ofr20171131>.

29           <sup>3</sup> Environmental Protection Agency. (n.d.). Fix a Leak Week | US EPA. EPA. Retrieved January  
30 17, 2023, from <https://www.epa.gov/watersense/fix-leak-week>. According to the government, a  
31 faucet that leaks at the rate of one drip per second can waste more than 3,000 gallons per year. *Id.*

1       The government opposes the motion, arguing Mr. Falaschi, and others at PWD,  
2 “conspired to exploit” the leak in the DMC and “did not passively allow *water to seep* through as  
3 he appears to argue in his motion.” [Gov’t Opp. at 3] [italics and bold added for emphasis]. The  
4 government argues it does not agree with the defense’s interpretation of the contract and that it is  
5 a question of fact for the jury whether use of the seepage was authorized. This is inaccurate and  
6 false. The contract makes clear that use of seepage was authorized and the government does not  
7 dispute the grand jury never received the contracts or considered whether the contracts authorized  
8 use of the seepage in question.

9       As set forth below, the Ninth Circuit has repeatedly held that the interpretation of a  
10 contract, whether a question of law or a mixed question of law and fact, is an issue for the court to  
11 decide and subject to de novo review. *Klamath Water Users Protective Ass’n v. Patterson*, 204  
12 F.3d 1206, 1210 (9<sup>th</sup> Cir. 1999); *O’Neill v. United States*, 50 F.3d 677, 682 (9<sup>th</sup> Cir. 1995);  
13 *Kennewick Irrigation Dist. v. United States*, 880 F.2d 1018, 1032 (9<sup>th</sup> Cir. 1989). PWD’s water  
14 contract authorized PWD to surface irrigate with seepage, store seepage, and put seepage to  
15 reasonable and beneficial use, thereby authorizing the use, direction, control, and management of  
16 seepage from the DMC, without any payment. Thus, there was no theft as a matter of law.

17       **II. ARGUMENT**

18       **A. THE COURT HAS THE POWER TO DECIDE MR. FALASCHI’S MOTION  
19           TO DISMISS BEFORE TRIAL BECAUSE THE INTERPRETATION OF A  
20           CONTRACT IS AN ISSUE OF LAW FOR THE COURT NOT THE JURY.**

21       The government contends that the motion to dismiss ignores controlling authority and that  
22 Mr. Falaschi’s motion cannot be adjudicated before trial in a motion to dismiss. This is incorrect  
23 on both points.

24       Indeed, both parties rely on the same propositions of law. The parties agree that a motion  
25 to dismiss is proper “when the challenge ‘involves questions of law rather than fact.’” Gov’t  
26 Opp. at 3 (quoting *United States v. Nukida*, 8 F.3d 665, 669 (9<sup>th</sup> Cir. 1993); see Mtn. Dismiss at 8

---

27       For a household of four a loss of 3,000 gallons represents a loss of 2.5% of the annual amount of  
28 water delivered to the household, which is ten times the rate of water loss from the DMC. *Id.*

1 (quoting same proposition). The parties also agree that “a motion requiring factual  
2 determinations may be decided before trial if ‘trial of the facts surrounding the commission of the  
3 offense would be of no assistance in determining the validity of the offense.’” Mtn. Dismiss at 8  
4 (quoting *United States v. Shortt Accountancy Corp.*, 785 F.2d 1448, 1452 (9<sup>th</sup> Cir. 1986); *see Gov’t*  
5 *Opp.* at 3 (“The Court can make preliminary findings of fact necessary to decide the legal  
6 questions presented by the motion if it can do so without ‘invad[ing] the province of the ultimate  
7 finder of fact.’”) (quoting *Nukida*, 8 F.3d at 669); *see also Fed. R. Crim.P. 12(b)(1)* (“A party  
8 may raise by pretrial motion any defense, objection, or request that the court can determine  
9 without a trial on the merits.”).<sup>4</sup>

10 Federal law governs the interpretation of contracts where the government is a party.  
11 *O’Neill v. United States*, *supra* 50 F.3d at 682 (interpreting Westlands Water District’s water  
12 service contract with the Bureau). The determination of whether a contract’s language is  
13 ambiguous is a question of law. *Id.*; *Klamath Water Users Protective Ass’n v. Patterson*, *supra*  
14 204 F.3d at 1210; *Kennewick Irrigation Dist. v. United States*, *supra* 880 F.2d at 1033 (holding  
15 government’s interpretation ambiguous, so viewed “the provision must be interpreted against the  
16 government, its drafter”).

17 Contract interpretation is reviewed de novo. *O’Neill v. United States*, *supra* 50 F.3d at  
18 682; *see also Klamath Water Users Protective Ass’n v. Patterson*, *supra* 204 F.3d at 1210  
19 (interpretation of a contract is a mixed question of law and fact subject to de novo review). Since  
20 the interpretation of a contract is subject to de novo review, whether an issue of law or a mixed  
21 question of law and fact, the interpretation of a contract is to be decided by the court and does not  
22 invade the province of the jury. *Cung Le v. Zuffa, LLC*, 108 F. Supp.3d 768, 777 (N.D. Cal.  
23 2015) (“It cannot be left to the jury to decide which side’s interpretation of the contract is the  
24 correct one because contract interpretation is an issue of law.”) (interpreting Nevada law).

25 \_\_\_\_\_  
26 <sup>4</sup> Mr. Falaschi’s motion does not argue that the Indictment fails to state an offense on its face. *See*  
27 *United States v. Boren*, 278 F.3d 911, 914 (9<sup>th</sup> Cir. 2012); *United States v. Jensen*, 93 F.3d 667,  
28 669 (9<sup>th</sup> Cir. 1996). Nor does the motion allege that the charges are not based on sufficient  
evidence. *Jensen*, 93 F.3d. at 669.

PWD's latest contracts with the Bureau of Reclamation unambiguously state that the United States does not have "any right to seepage or return flow being put to reasonable and beneficial use pursuant to this Contract within the Contractor's Service Area by the Contractor [PWD] or those claiming by, through, or under the contract." [Dkt 22-9 at 34 of 64]. Mr. Falaschi's motion to dismiss confirms, as alleged in the indictment, that the water leaking from the DMC into a standpipe was "seepage" PWD was fully authorized to use without charge by its contracts with the Bureau. Therefore, there was no requirement to pay for the seepage. This proves there was no water theft.

What is seepage is a matter of law, a legal issue ripe for pretrial determination by the court. The interpretation of a contract, whether a question of law or mixed question of law and fact, is a legal determination subject to de novo review. *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1210 (9<sup>th</sup> Cir. 1999); *O'Neill v. United States*, 50 F.3d 677, 682 (9<sup>th</sup> Cir. 1995); *Kennewick Irrigation Dist. v. United States*, 880 F.2d 1018, 1032 (9<sup>th</sup> Cir. 1989).

**B. WATER LEAKING FROM THE DMC WAS SEEPAGE THAT PWD WAS AUTHORIZED TO USE.**

PWD's initial 1955 water contract, and subsequent 1974 water contract, with the Bureau authorized PWD to use seepage from the DMC for surface irrigation or storage within PWD.<sup>5</sup> PWD's 2009 interim renewal water contract with the Bureau broadened PWD's authorized use of seepage from the DMC beyond simply surface irrigation and storage. The 2009 contract, and each water contract thereafter, authorized PWD to use seepage if it was put to "reasonable and beneficial use" within PWD.<sup>6</sup>

---

<sup>5</sup>The 1955 water contract provided that the United States did not have any right to claim "waste, seepage, or return flow, to water being used pursuant to this contract for surface irrigation or underground storage within the District's boundaries by the District or those claiming by, through, or under the District." [Dkt 22-7 at pg. 12 of 30]. The 1974 water contract provided that the United States did not have any right to claim "waste, seepage, or return flow, to water being used pursuant to this contract for surface irrigation or under-ground storage within the Contractor's service area boundaries by the Contractor or those claiming by, though, or under the Contractor." [Dkt 22-8 at pg 22 of 57].

<sup>6</sup> The 2009 interim renewal contract clarified and expanded the authorized use of seepage under the contract as follows:

The government's opposition states it does not agree with the defense's interpretation of the contract provision or concede that the provision applies. The government provides no argument, evidence, or legal authority as to why it does not agree with the defense's interpretation of the provision or why the provision does not apply.

Water from the DMC seeped into the standpipe and cracked a gate in the standpipe. Replacement of the cracked gate does not convert the water seeping from the DMC into the standpipe into something other than seepage. Opening the gate to use the seepage does not convert the seepage into something other than seepage because use of the seepage was authorized by PWD's contracts. Similarly, placing a lid with a lock on top of the standpipe and elbow pipe off the standpipe does not convert water seeping from the DMC into the standpipe into something other than seepage.<sup>7</sup>

111

111

111

111

111

(c) The United States reserves the right to all seepage and return flow water derived from Water Delivered to the Contractor [PWD] hereunder which escapes or is discharged beyond the Contractor's Service Area; **Provided, That this shall not be construed as claiming for the United States any right to seepage or return flow being put to reasonable and beneficial use pursuant to this Contract within the Contractor's Service Area** by the Contractor or those claiming by, through, or under the Contractor. [Dkt 22-9 at pg. 34 of 64] [see also Dkt 22-10 at pg. 3 of 8; Dkt 22-11 at pg. 3 of 8; Dkt 22-12 at pg. 3 of 8; Dkt 22-13 at pg. 2 of 4].

<sup>7</sup> Assessing the seepage was done at the direction of the PWD board. Employee 3, Chris Bettencourt, testified before a 2017 grand jury panel that he opened the standpipe and diverted water from the DMC at the request of Michael Linneman, a PWD board member and farmer. [Dkt 22-5 at pgs 4-5]. The government does not dispute that the grand jury that indicted Mr. Falaschi was not informed the board directed accessing the seepage or of the water contracts between PWD and the Bureau. The PWD board members profited from utilizing the seepage, not Mr. Falaschi, who was paid a salary substantially less than other Special District General Managers as a matter of public record. [Dkt. 22 at fn.1]. Yet to try to create a motive, the government falsely alleges Mr. Falaschi was paid an exorbitant salary.

The use, direction, storage, control, and management of seepage is clearly contemplated in the contracts by the clear authorization of the use of seepage, initially for surface irrigation and storage, then broadened to reasonable and beneficial use. Seepage cannot be stored, used to irrigate, or otherwise put to reasonable and beneficial use unless it is directed to a location and managed and controlled to prevent flooding and other potential forms of damage caused by water that is not directed, stored, controlled, or managed properly.

PWD was totally authorized to use water that seeped from the DMC into the farmer's standpipe. After replacement of a cracked gate in the standpipe, caused by the seepage, water continued to seep from the DMC into the standpipe.

The water contract authorized PWD to use the seepage and no argument or authority is provided by the government as to why PWD was not authorized to use seepage from the DMC that went into the standpipe after the gate was replaced. Similarly, placement of a lid and lock on the standpipe and elbow off the standpipe in no way deauthorized the use of the seepage and no argument, evidence, or authority is provided by the government in support of such an argument.

### III. CONCLUSION

For the reasons set forth above and in the initial motion to dismiss, the Court should dismiss counts 1-2.

Respectfully submitted,

Dated: January 18, 2023

/s/ Oliver W. Wanger  
OLIVER W. WANGER

/s/ Marc Days  
MARC DAYS

/s/ John Balazs  
JOHN BALAZS

Attorneys for Defendant  
**DENNIS FALASCHI**